LIBRARY
SUPREME COURT, U. S.

Supreme Court, U.S.
FILED
JUL 16 1971
E. ROBERT SEAVER, CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1971

No. 71-88

THE M/V CYGNUS AND LEON SHAFFER GOLNICK,

Petitioners,

v.

MERRILL-STEVENS DRY DOCK CO.,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

GEORGE W. LIEBMANN,

PETER H. GUNST,
1300 Mercantile Bank & Trust Bldg.,
2 Hopkins Plaza,
Baltimore, Maryland 21201,

Attorneys for Petitioners.

The Daily Record Co., Baltimore, Md. 21203

Table of Contents

	PAGE
Opinions Below	1
Jurisdiction	2
Questions Presented	2
Statutes Involved	3
Statement of the Case	3
Reasons for Granting the Petition:	
A. The Fifth Circuit, By Denying The Petitioners *Both* Oral Argument And A Reasoned Opinion, However Brief, In A Case Which It Had Determined To Be Non-Frivolous, Deprived Them Of The First Appeal As Of Right To Which They Were Entitled By The Federal Appeals Statute And By The Federal Rules of Appellate Procedure	5
B. The Decision Of The District Court Awarding Counsel Fees To The Respondent And Holding Fees To Be 'Necessaries' Within The Maritime Lien Statute Is In Conflict With The Governing Statute And With Other Decisions In The Same District, In Other Districts For The Same Circuit And In Other Circuits And If Generally Followed Will Create A Needless Conflict Between Maritime Lien Practice In The United States And Maritime Lien Practice In The Numerous Nations Whose Lien Practice Is Governed By The Brussels Convention On Maritime Liens of 1926	11
C. Petitioners Were Deprived Of Due Process of Law By Reason Of The Denial Of Necessary Continuances And Of Their Motion For New Trial Foreclosing Presentation Of The Testimony Of The Vessel's Owner And Of Its Key Expert Witness, And Their Case Pre-	

PAGE

sents Important Questions Concerning The Standards Which Should Govern Continuances And New Trial Motions Under The Constitution And The Federal Civil Rules 16

CONCLUSION 20

APPENDIX A — Opinion of the District Court 1a

APPENDIX B — Order of Court of Appeals 13a

APPENDIX C — Order of Court of Appeals Denying Petition for Rehearing 14a

APPENDIX D — Statutes Involved 14a

APPENDIX E — Motion for New Trial in District Court 16a

TABLE OF AUTHORITIES

Cases

Allen v. M/V Contessa, 196 F. Supp. 649 (S.D. Tex. 1961) 11, 15

Commercial Credit Corp. v. Pepper, 187 F. 2d 71 (5th Cir. 1951) 19, 20

Cornwell v. Cornwell, 118 F. 2d 396 (D.C. Cir. 1941) 20

Delrichs v. Spain, 15 Wall. 211, 21 L. Ed. 43 (1872) 12, 15

Gallis v. Peellee Company, 264 F. 2d 663 (2d Cir. 1959) 19

Georgia Pacific Corporation v. United States, 264 F. 2d 101 (5th Cir. 1959) 19

Groendyke Transport, Inc. v. Davis, 406 F. 2d 1158 (5th Cir. 1969) 6

Isbell Enterprises, Inc. v. Citizens Casualty Co. of New York, 431 F. 2d 409 (5th Cir. 1970) 6, 7

N.L.R.B. v. Amalgamated Clothing Workers, 430 F. 2d 966 (5th Cir. 1970) 7

PAGE

Peterson v. SS Walcondall, 216 F. Supp. 642 (D. La. 1963) 11

Sea-Land Service, Inc. v. Connor, 418 F. 2d 1142 (D.C. Cir. 1969) 6

Talon, Inc. v. Union Slide Fastener Co., Inc., 226 F. 2d 731 (9th Cir. 1959) 20

The Cooperfield & The Dea, 26 F. 2d 175 (5th Cir. 1928) 12

The Electron, 74 F. 689 (2d Cir. 1898) 15

The Home, 65 F. Supp. 94 (D.C.W.D. Wash. N.D. 1964) 12

The John Jay, 15 F. Supp. 937 (D.C.E.D. Pa. 1936) 12

Articles

Carrington, *Crowded Dockets in the Court of Appeals: The Threat to the Function of Review and the National Law*, 82 Harv. L. Rev. 542 (1969) 10

Carrington, *The Dangers of Judicial Delegation: Concluding Remarks*, 52 F.R.D. 76 (1971) 8-10

Comment, *Developments in the Law of Maritime Liens*, 45 Tulane L. Rev. 577 (1971) 15

Kriz, *Ship Mortgages, Maritime Liens and Their Enforcement*, 1963 Duke L.J. 671 (1963) 16

Right to Counsel Fees in Federal Court, 8 L. Ed. 894 (1962) 12, 15

Wright, *The Overloaded Fifth Circuit: A Crisis in Judicial Administration*, 42 Texas L. Rev. 949 (1964) 6, 10

Statutes Cited

Fifth Circuit Rule 18 5

Fifth Circuit Rule 21 ..... 7, 11

Federal Rules of Appellate Procedure, Rule 34 ..... 3, 6

Federal Rules of Civil Procedure, Rule 59 3

PAGE

28 U.S.C. Section 1254(1) 2

28 U.S.C. Section 1291 ..... 2, 3

46 U.S.C. 971 ..... 2, 3, 11

Brussels Convention on Maritime Liens of 1926, Article 2 11

Treatise

2 *Benedict on Admiralty*, Section 352 ..... 12, 18

6 Moore, *Federal Practice*, Section 59.15[3] 19

IN THE

Supreme Court of the United States

OCTOBER TERM, 1971

No. ------

THE M/V CYGNUS AND LEON SHAFFER GOLNICK,

Petitioners,

v.

MERRILL-STEVENS DRY DOCK CO.,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

Petitioners pray that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Fifth Circuit, entered on May 27, 1971 upon denial of petition for rehearing addressed to the court's judgment of April 13, 1971.

OPINIONS BELOW

The order of the United States Court of Appeals for the Fifth Circuit, without opinion, was reported at 441 F. 2d 269 and is reprinted as Appendix B hereto. The opinion of the District Court is unreported and is reprinted herewith as Appendix A.

JURISDICTION

The judgment of the Court of Appeals was entered on April 13, 1971 and the Petition for Rehearing was denied on May 27, 1971. The Order denying the Petition for Rehearing is reprinted as Appendix C hereto. This Petition is being filed within the 90 days following denial of the Petition for Rehearing. Jurisdiction is conferred on this Court by 28 U.S.C. Section 1254(1). Jurisdiction was conferred on the District Court (except as to the award of attorneys' fees) by 46 U.S.C. Section 971. The District Court lacked jurisdiction to award attorneys' fees.

QUESTIONS PRESENTED

A. Whether the Fifth Circuit, by denying the petitioners *both* oral argument and a reasoned opinion, however brief, in a case which it had determined to be non-frivolous, deprived them of the first appeal as of right to which they were entitled by the Federal Appeals Statute and by the Federal Rules of Appellate Procedure?

B. Whether the decision of the District Court awarding counsel fees to the respondent and holding fees to be "necessaries" within the Maritime Lien Statute is in conflict with the governing statute and with other decisions in the same district, in other districts in the same circuit and in other circuits and whether it, if generally followed, will create a needless conflict between maritime lien practice in the United States and maritime lien practice in the numerous nations whose lien practice is governed by the Brussels Convention on Maritime Liens of 1926?

C. Whether petitioners were deprived of due process of law or their rights under the Federal Civil Rules by reason of the denial of necessary continuances and of their motion for new trial foreclosing presentation of the testimony of the vessel's owner and of its key expert witness?

STATUTES INVOLVED

The statutes involved are the Maritime Lien Act, 46 U.S.C. Section 971 et seq, Fifth Circuit Rules 18 and 21, Rule 34 of the Federal Rules of Appellate Procedure, and 28 U.S.C. Section 1291, the statute conferring a first appeal as of right on Petitioners.

STATEMENT OF THE CASE

On April 13, 1971 the Fifth Circuit summarily affirmed without hearing or opinion the decision of the District Court granting judgment in favor of the plaintiff in the total amount of $18,012.12, including attorneys' fees of $2,825, and denying defendant's motion under Rule 59 (Appendix E). The decision of the trial court denying the motion under Rule 59 was likewise without opinion, as was the subsequent denial of rehearing by the Court of Appeals.

This suit involves a proceeding *in rem* on a maritime lien by the owner of a boatyard against a pleasure yacht. The fundamental issues in the case were summarized by defendant's counsel as follows:

> (Mr. Larimore) Your honor, the position of the defendant is that much of this work was not authorized by the defendant, by the owner, claimant-owner. Much of the work was performed unsatisfactorily and resulted in re-repair costs and nonfunctioning of the very matters that were being repaired, and the charges that were imposed for work that was performed and authorized were unreasonable, excessive, and we hope to be able to prove that (T. pp. 11-12).

It is apparent that a key witness on the authorization issue must be the owner of the vessel himself. To deny a defendant the opportunity to present the testimony of an owner is in essence to deny a defendant the right to make out the defense that work done was not authorized. It is the contention of the defendant that this is precisely what

happened here in consequence of the repeated denial of necessary continuances by the trial court.

It also is apparent that in order to make out the defense that work was unsatisfactorily performed and that charges claimed for were excessive, expert testimony was essential. Defendant was likewise almost entirely precluded from making out its defense based on these issues. The denial of requested continuances and the denial of its motion under Rule 59 precluded it from offering the testimony of its key expert witness, an employee of another boatyard which did the re-repair work made necessary by the unsatisfactory performance of work by plaintiff. Further, the testimony of another expert called by defendant was unduly restricted by the Court (T. pp. 270-73, E. pp. 207-12).* Defendant was even prevented from introducing the invoices resulting from re-repair (T. pp. 354-55, E. pp. 280-82). The owner being absent and continuance being denied, his deposition was admitted into evidence. However, the Court's Memorandum of Decision makes clear that unspecified portions of this deposition were disregarded by the Court (E. p. 354, App. 7a). To render complete the foreclosure of defendant from any opportunity to make out its case, the owner's answers to interrogatories and supplemental answers to interrogatories and the exhibits annexed to them were excluded from evidence, thus denying the Court even the owner's contentions as to many of the facts in dispute, notwithstanding the fact that the owner had been subjected to cross-examination at his deposition as to these matters and had been available for such examination. The Court further awarded attorneys' fees against petitioners, contrary to the Maritime Lien statutes. While defendant under other circumstances

---

* T. references are to the Transcript and E. references are to the Record Extract in the Court of Appeals. The Appendix to this Petition is referred to as App.

might have been inclined to suffer their judgment, they could not do so without recourse to further appeal when acquiescence in the judgment would constitute, as here, an acquiescence in an almost total denial of due process of law and of any meaningful opportunity to make out their case. Upon appeal, the Fifth Circuit, after classifying the appeal as non-frivolous by placing it in the second class defined by Fifth Circuit Rule 18, denied the petitioners oral argument and then decided the case completely without opinion and denied without hearing or opinion their motion for rehearing.

Petitioners believe that under these circumstances justice requires that the judgment be reversed and that the case be remanded to allow defendant to present the testimony of the owner and of the expert witness familiar with re-repair costs and the circumstances of re-repair.* Further, petitioners contend that the award of counsel fees in an *in rem* maritime lien case was improper and that, at the least, the propriety of such award presented an important question of law deserving of oral argument before, or, at least, a reasoned decision by, the Fifth Circuit.

REASONS FOR GRANTING THE PETITION

A. THE FIFTH CIRCUIT, BY DENYING THE PETITIONERS *BOTH* ORAL ARGUMENT AND A REASONED OPINION, HOWEVER BRIEF, IN A CASE WHICH IT HAD DETERMINED TO BE NON-FRIVOLOUS DEPRIVED THEM OF THE FIRST APPEAL AS OF RIGHT TO WHICH THEY WERE ENTITLED BY THE FEDERAL APPEALS STATUTE AND BY THE FEDERAL RULES OF APPELLATE PROCEDURE.

Docket pressures have resulted in a progressive and by now notorious debasement of the right of appeal in the

* Defendant does not seek complete retrial but asks only for an opportunity to present the testimony of persons unavailable at the trial, subject, of course to plaintiff's right to present rebuttal testimony.

Fifth Circuit. Seven years ago, when conditions had already reached the crisis stage, a commentator wrote:

> Let Congress create six more judgeships for the present Fifth Circuit. Those judges will prevent the docket of that court from falling into complete collapse, and while they work, it will be possible to see what happens when a court of appeals has more than fifteen judges.
>
> Wright, *The Overloaded Fifth Circuit: A Crisis in Judicial Administration*, 42 Texas L. Rev. 949 (1964).

It is now possible to see what happens. By Fifth Circuit Rule 18, adopted on December 13, 1968, the right to oral argument contemplated by Federal Rule of Appellate Procedure 34 was foreclosed not merely in a "Class 1" of frivolous cases but in a "Class 2" of cases representing in 1970 nearly 40% of the court's docket. See *Isbell Enterprises, Inc. v. Citizens Casualty Co. of New York*, 431 F. 2d 409 (5th Cir. 1970). In *Groendyke Transport Inc. v. Davis*, 406 F. 2d 1158 (5th Cir. 1969), an intention was expressed to limit this procedure to cases where time was of the essence or one party was clearly entitled to judgment as a matter of law, a limitation, now in desuetude, not referred to in subsequent opinions. Doubt was expressed as to the validity of eliminating oral argument in even these two classes of cases by the District of Columbia Circuit in *Sea-Land Service Inc. v. Connor*, 418 F. 2d 1142, 1147 (D.C. Cir., 1969). On August 14, 1970, in the *Isbell* case, 431 F. 2d at 414, the court eliminated even the requirement that opinions following denial of oral argument contain a statement that the court "has concluded on the merits that this case is of such character as not to justify oral argument." Even the bare reference to the *Isbell* case accompanying summary calendar opinions is to be

eliminated after a transitional period. *Isbell, supra,* 431 F. 2d at 414 n. 21.

In May, 1970, the court went even further and adopted Fifth Circuit Rule 21. That rule allows the court to dispense with any opinion in four defined classes of cases, the only two of which appliable to civil non-jury cases being 1) that a judgment is based on findings of fact which are not clearly erroneous and 4) that no error of law appears. The court need not even specify in which of the four categories the case falls, the rule going further in this respect than its closest analogy, Rule 13(c) of the District of Columbia Court of Appeals. See *N.L.R.B. v. Amalgamated Clothing Workers*, 430 F. 2d 966, 972 (5th Cir. 1970).

Not every case requires a judicial opinion. Not every case requires oral argument. Petitioner here is well aware of the docket pressures upon the Courts of Appeal. There can be no objection to many, indeed most, of the methods used to alleviate docket pressures. These include 1) abbreviation of oral argument 2) summary disposition from the bench after oral argument 3) hearing of cases by panels of less than three 4) summary disposition of cases by brief but reasoned *per curiam* opinions but without oral argument 5) summary disposition of cases without oral argument and without opinions by courts with discretionary jurisdiction or by courts to which a *second* appeal is taken or by courts passing on appeals from multi-judge trial courts 6) hearing of appeals on oral argument alone but without briefs 7) dismissal without argument or opinion of the occasional patently frivolous case or 8) statutory restriction of rights of appeal. But to permit in the same first non-frivolous appeal of right from a single-judge non-jury court *both* denial of oral argument and denial of a reasoned opinion however brief is to countenance a procedure which cannot to anyone, and particularly to laymen, ap-

pear to be an appeal in any meaningful sense. Efficiency has here been carried too far and has vitiated the appeal as of right which Congress provided, as the eloquent recent warning of Professor Carrington reminds us:

> As a preliminary comment, let me suggest that screening inevitably creates a new issue to be decided. Unless its use is limited to the very clearest cases, it can serve to add new complexity to the cases in which it is used. Under the Fifth Circuit rule, for example, the court can find itself writing a fairly lengthy opinion which is cast in the posture of an explanation as to why it is proper to make the decision without hearing argument. More importantly, concern for avoiding this unseemliness must influence the court, with the result that the docket manager is influencing the decision fairly directly. This creates a problem of delegation. So, likewise, do many other forms of reliance on non-judicial personnel. Perhaps that is a good thing. Doubtless we can stand a little judicial delegation. But surely there is a point at which this becomes undesirable, and sufficiently so that we should look elsewhere for the means to cope with the caseload.
>
> Let me emphasize this by asking you to consider the ultimate in delegation. It would be possible to manage an entire judicial system, however, large with one panel of judges, indeed with a single judge. What would be required is a very large and reasonably talented staff. I dare to suggest that one of our largest law firms could easily manage the appellate business of all the federal courts. They would need a good deal of internal discipline and efficiency. In order to maximize their efficiency, they might find it most useful to hold oral arguments before a single associate in the firm, or perhaps without any hearing officer at all, and tape record the arguments for use by those more senior associates and partners who might review the decision as it floated upward through the office and out, over the signature of the senior partner. My guess is that such an operation would produce very craftsmanlike

decisions, perhaps significantly better than what we now read in the Federal Reporter, even though that publication is already my favorite periodical. I fancy that there would be very few "splits in the circuits" and no confusing dissents or concurrences. The *corpus juris* would probably be as certain as we have ever known it. Indeed, it might become so stable and certain that appeals would be less speculative and the gambling appellant would be deterred from wasting his money and our time.

What would be lost in the change to that kind of system of appellate review? I believe that it is the quality which Judge Edwards had in mind in proclaiming his commitment to "individualized justice" and in stressing the importance of oral argument. It may also be the same quality which the draftsmen of the California Supreme Court had in mind in requiring written opinions. I would describe it as the human component of the process of review. No longer would we make the commitment which we now make to every individual in our society that his grievance will be heard and answered by high government officials. Instead, we would promise only that his grievance would go into the same large institution as all other grievances of a like class. Each individual would receive the same impersonal treatment as everyone else.

Filled as it is with the voices of hostile youth, my town of Ann Arbor may be the wrong place in which to form an opinion; but if my reading of the public spirit is correct, this is very much the wrong time to making that kind of de-personalizing change in the character of the appellate process. At least such changes should be limited to small doses, carefully prescribed.

Indeed, I would urge that some of the changes that we are tempted to make in the name of efficiency might well be reversed, at least in cases which are important to individuals, as distinguished from corporations, whose officers would doubtless be fully satisfied by corporate judicial decision-making. It might be wise to

> enlarge the time for oral argument, not diminish it, in order to give appellate judges more time to ask questions, to demonstrate that they are listening and are concerned with their responsibility for the rights of other individuals. Likewise the per curiam opinion, efficient though it is, may deprive the process of some of its traditional humanity.
>
> Let me hasten to concede that all of this is mere symbolism. But, I would assert, the judicial process is very importantly symbolic. It is a ritual not entirely unlike many primitive rituals. It is a ritual which celebrates our common concern for the right of each individual to insist that official decisions affecting him be made subject to general principles of humane quality enforced by high officials personally familiar with his problem. In this respect, the judicial ritual is quite different from that which is expressed in the work of our large administrative agencies which function more impersonally.
>
> I see nothing to suggest a diminishing public concern for the humanistic emphasis on the individual's role in the judicial process. For myself, I would much prefer other changes in our judicial institutions and processes to those which would depreciate the symbols of individual rights and personal responsibilities. I urge those who share that general preference to be very cautious in making changes that promote a new model of corporate or institutional adjudication in our appellate courts.

Carrington, *The Dangers of Judicial Delegation: Concluding Remarks*, 52 F.R.D. 76 (1971). See also Carrington, *Crowded Dockets in the Courts of Appeals: The Threat to the Function of Review and the National Law*, 82 Harv. L. Rev. 542, 559, 571, 574 (1969); Wright, *The Overloaded Fifth Circuit: A Crisis in Judicial Administration*, 42 Texas L. Rev. 949, 960 (1964).

A litigant whose cause is non-frivolous is entitled to some visible assurance that the judges of an appellate

court have given particular attention to his case. The Fifth Circuit should be able to enforce its Rule 18 eliminating oral argument. It should be able to enforce its Rule 21 eliminating any reasoned decision. But it cannot be permitted consistent with federal statutes conferring a first appeal as of right, to apply *both rules in the same non-frivolous case.* The federal appeals statutes and Federal Rules of Appellate Procedure contemplate *efficient* appellate courts, but they do not contemplate *invisible* appellate courts.

B. THE DECISION OF THE DISTRICT COURT AWARDING COUNSEL FEES TO THE RESPONDENT AND HOLDING FEES TO BE "NECESSARIES" WITHIN THE MARITIME LIEN STATUTE IS IN CONFLICT WITH THE GOVERNING STATUTE AND WITH OTHER DECISIONS IN THE SAME DISTRICT, IN OTHER DISTRICTS FOR THE SAME CIRCUIT AND IN OTHER CIRCUITS AND IF GENERALLY FOLLOWED WILL CREATE A NEEDLESS CONFLICT BETWEEN MARITIME LIEN PRACTICE IN THE UNITED STATES AND MARITIME LIEN PRACTICE IN THE NUMEROUS NATIONS WHOSE LIEN PRACTICE IS GOVERNED BY THE BRUSSELS CONVENTION ON MARITIME LIENS OF 1926.

The petitioners' position on the question whether attorneys' fees are properly awardable in maritime lien cases was clearly stated in their brief on appeal:

> The Maritime Lien Act (46 U.S.C. 971, et seq.) creates a lien against vessels for necessaries furnished to them. Attorney's fees are simply not an item for the recovery of which the statute creates a lien. See U.S. Code Annotated Title 46 Section 971, Notes 18-20. This is recognized clearly in *Allen v. M/V Contessa* (S.D. Tex. 1961) 196 F. Supp. 649 wherein the Court, in effect, concluded that it made no difference that a state statute expressly authorized the recovery of attorney's fees. Nor is a state statute involved in this case. Also see *Peterson v. SS Wahcondall* (Dist. La. 1963), 216 F. Supp. 642.

Although the rule was otherwise prior to the enactment of the fee bill of 1853, attorney's fees have since been generally disallowed in admiralty. *Delrichs v. Spain* (1872 U.S.) 15 Wall 211, 21 L. Ed. 43; See Anno: *Right to Counsel Fees in Federal Court*, 8 L. Ed. 894, 903. The two preferred ship mortgage cases cited by the Court below in the Memorandum of Decision (concededly prepared by plaintiff's counsel) deal with contractual rights to attorney's fees valid under state law and secured by the mortgage. *The Home* (D.C.W.D. Wash. N.D. 1946) 65 F. Supp. 94; *The John Jay* (D.C. E.D. Pa. 1936) 15 F. Supp. 937; Annot, supra, p. 903. The Martime Lien Act secures only necessaries. It is significant that this contractual exception (in the case of ship mortgages) to the Rule in Admiralty precluding the recovery of attorneys fees has never been extended to Maritime Lien cases, and has in fact been decided contrary to plaintiff's position. It no doubt stems from a recognition that the highest priority Maritime Lien is secret in nature given for necessaries furnished on the credit of the vessel. Contractual rights to attorney's fees are in derogation of an extension of credit to the vessel.

Nor does the vessel waive its defense to the claim for attorney's fees by filing a counterclaim. 2 Benedict on Admiralty Section 352 p. 460 Note 28; *The Electron* (1896) 74 F. 689 (C.C.A. 2d).

The Memorandum of Decision concludes the subject of attorney's fees by justifying recovery against Golnick citing *The Cooperfield and the Dea* (5th Cir. 1928) 26 F. 2d 175 and Supp. Rules C (6) and E (8). The former was an in personam case from its inception analyzed in Supplemental Memorandum of Defendant in Support of New Trial (Rec. 557-560). The latter rules do not apply as the counterclaim was filed by the defendant vessel. Golnick did not become a defendant until added as a judgment debtor after trial, a procedure for which there appears to be no precedent. No claim was ever asserted either in Complaint, reply to Counterclaim or Pre-Trial Stipulation, or

otherwise, against Golnick (Brief of Appellant, pp. 8-9).

That the award of attorneys' fees in a proceeding to enforce a maritime lien is open to substantial question was acknowledged by respondent's own expert witness on the subject of attorneys' fees in admiralty, James Hurley, Esquire, by whose testimony plaintiffs are bound. Counsel for respondent introduced Mr. Hurley by stating that "Mr. Hurley is here to testify as an expert on attorneys' fees" (T. p. 61, E. p. 43). Mr. Hurley testified as follows:

> Q. You are an admiralty lawyer. It is customary that fees be allowed an attorney in an in rem proceeding against the vessel? Have you ever seen that happen? A. I've seen it happen. Whether or not that is the law, I don't know. I think there is a violent dispute with regard to it. Certainly, some cases, or there is a case, as I understand — I have forgotten the name of the proceeding — or there is an analogy that can be drawn that an in rem proceeding, you are not entitled to attorney's fees insofar as the vessel is concerned.
>
> There is another theory of attack that says the attorney's fees are part of the consideration of the work that was performed, the same as your sales tax and any other — the interest amounts that are allowed (T. pp. 67-68).
>
> Q. Do you know of any case in any division of this court where attorney's fees have been denied in rem? A. Yes, Judge Mehrtens, one of our cases, once. We didn't take an appeal. We were going to but the client didn't want to bear the cost of the appeal.
>
> Q. Do you know of other cases in this court over the years where they have been allowed in rem? A. Yes, many of them (T. p. 69).
>
> Q. When you say cases, are you talking about maritime lien cases? A. I am talking—
>
> Q. Against the vessel only? A. Well, the case where we were told there were no attorney's fees was strictly in rem. That was one of Judge Mehrtens' decisions.

> Q. Just like this case? A. Just like this case. We have obtained attorney's fees in other cases that were in rem. Because of the possibility or the doubt that we have, or I have in my mind, why, if it is at all possible we go both in personam and in rem, so I may say the majority of cases we have both a personam and in rem suit going (T. p. 70).

The effort of plaintiff and the court below to avoid this question by asserting that defendant's filing of a counterclaim operated to expose it to liability for attorneys' fees in plaintiff's *in rem* claim is difficult indeed to understand. The gravamen of plaintiff's action pursuant to which damage was awarded was an *in rem* action against the ship alone. Even after the filing of defendant's counterclaims plaintiff did not amend its action to assert a cause of action against Mr. Golnick *in personam*, the course suggested by its own expert, Mr. Hurley. Having made its election, plaintiff is bound by it. The maritime lien in admiralty is an exceptional procedure in our law, effectively requiring, as it does, defendant to post bond for the amount claimed, in order to secure the release of his vessel. It would constitute a great extension and gross abuse of this proceeding to hold that attorneys' fees are properly awardable in it so as to require a bond not merely for amounts claimed, but for attorneys' fees also, in order to secure release of vessels. The beneficient maritime lien, designed to secure the supply of necessaries to vessels in foreign ports by providing their suppliers with a lien for the provision of such necessary goods and services should not be perverted so as to permit liened vessels to be subjected to a requirement of posting bond not merely for the amount of the lien but for security for costs also. A ship requiring necessaries should not be placed in a position of a plaintiff in stockholder's derivative litigation

in jurisdictions possessing security for cost statutes. Since plaintiff's theory here is that attorneys' fees are necessaries within the maritime lien statute (see Brief of Appellee, p. 5: "it [the attorney's fee] is a portion of the indebtedness due to the plaintiff which the maritime lien secures") affirmance of the judgment below would have precisely this effect. The subject was clearly one calling for plenary consideration by the Fifth Circuit.

This is particularly so in light of the conflicting authority in the same district court alluded to by respondent's expert witness; in light of authority elsewhere in the same Circuit, see *Allen v. M/V Contessa*, 196 F. Supp. 649 (S.D. Tex. 1961), and in light of the prevailing rule in other circuits and throughtout the nation concerning attorneys' fees in admiralty since the fee bill of 1853. See *Delrichs v. Spain*, 15 Wall 211, 21 L. Ed. 42 (1872); Annotation, *Right to Counsel Fees in Federal Court*, 8 L. Ed. 894, 903; *The Electron*, 74 F. 689 (2d Cir. 1896); 2 *Benedict on Admiralty*, Section 352, p. 460, n. 28. The costs of litigation for which a lien exists are limited to those enumerated in 28 U.S.C. Section 1921, and attorneys' fees are scarcely necessaries furnished on the credit of the vessel. See Comment, *Developments in the Law of Maritime Liens*, 45 Tulane L. Rev. 577-81, 598-601 (1971). Moreover, recognition of a contrary rule in this country would gratuitously create a conflict between its practice and that of the numerous important maritime nations whose lien law is still governed by the Brussels Convention on Maritime Liens of 1926. Article 2(5) of that convention provides for liens only for articles and services necessary for the preservation of the vessel or the continuation of her voyage, while Article 2(1) provides for satisfaction by the vessel only of "law costs and fees *due to the state*" (emphasis added). See

Kriz, *Ship Mortgages, Maritime Liens and Their Enforcement*, 1963 Duke L.J. 671, 689 (1963).

C. PETITIONERS WERE DEPRIVED OF DUE PROCESS OF LAW BY REASON OF THE DENIAL OF NECESSARY CONTINUANCES AND OF THEIR MOTION FOR NEW TRIAL FORECLOSING PRESENTATION OF THE TESTIMONY OF THE VESSEL'S OWNER AND OF ITS KEY EXPERT WITNESS, AND THEIR CASE PRESENTS IMPORTANT QUESTIONS CONCERNING THE STANDARDS WHICH SHOULD GOVERN CONTINUANCES AND NEW TRIAL MOTIONS UNDER THE CONSTITUTION AND THE FEDERAL CIVIL RULES.

Respondent's case here was totally unsupported by any testimony of disinterested expert witnesses other than one expert on attorney's fees, the only expert testimony being adduced by respondent being the testimony of respondent's own employees. Petitioners, on the other hand, produced disinterested expert testimony, the qualifications of petitioners' expert witness being admitted (T. p. 265, E. p. 204). However, much of the testimony of this expert witness was excluded on the ground that he had no immediate familiarity with conditions on the defendant vessel at the time the contested work was done, his acquaintance with the issues being said to be limited to reasonable charges for similar work (T. pp. 270-73, E. p. 208-12). In argument petitioners' counsel alluded to the lack of disinterested witnesses supporting respondent's case and when petitioners' counsel observed "their not being here I think should be noted", respondent's counsel stated "let them call them in" (T. p. 379). As the affidavit annexed to the Motion for New Trial makes clear (E. p. 71) petitioner had, a week before trial, sought to subpoena just such a key disinterested expert witness, Bob Sacks of Jimmie Diesel Service, the company doing the re-repair work made necessary by the defects in plaintiff's work. That affidavit relates:

> Affiant caused to be issued and delivered to the Marshal on Tuesday, June 23, 1970 a Subpoena Duces Tecum to Bob Sacks of Jimmie Diesel Service, 961 N.W. 7th Street, Miami, Florida.
>
> The U.S. Marshal's office advised affiant that Deputy Marshal, Bill Hunter, was unable to serve that Subpoena upon said Bob Sacks, that the witness was contacted by the Deputy on June 25 and told by the witness that he would call the Deputy and also pick up the Subpoena before the trial. The witness did neither and the Subpoena was returned unexecuted (E. p. 371).

On the first day of trial, June 29, following a discussion of the absence of the petitioner Golnick (T. p. 3), petitioners' counsel stated:

> (The Court) You have about how many witnesses?
>
> (Mr. Larimore) Your Honor, I have one that I know of and another that I was advised by the Marshal's office this morning the Subpoena hadn't been returned and I don't know whether it has been served or not (T. p. 12).

Had the continuance requested by petitioners' Motion for Continuance filed on June 23, and further requested by petitioners on all three days of trial, or had the Motion for New Trial been granted the testimony of this key witness would have been available. The importance of his testimony was acknowledged by the Court in its opinion in the course of which it observed:

> Indeed, the owner has not availed himself of tools that are available to assist him in proving his contentions of unreasonable prices charged and of defective work; and by that I mean the use of experts to examine the boat itself at the time the cursory examination was made by Mr. Hallbauer and other times and the summoning of any witnesses who might have been on the craft at that time.

> Indeed, it is difficult for the Court to reconcile the owner's contentions of grossly defective work done and unreasonably high charges with his failure to present a full case at this trial (T. p. 391, E. p. 285).

The relevance of this witness's testimony was clear. The respondent itself adduced testimony relating to the overhaul of the Cygnus by Jimmie Diesel (T. pp. 106-09, E. pp. 74-79). It is also not unreasonable to suppose that this absent witness would have presented pertinent testimony relating to the adequacy of the engine work done by plaintiff since no less than two of respondent's own witnesses acknowledged that an oil leak existed in the areas of the engine that respondent worked on after respondent worked on them (T. p. 209, E. p. 156, testimony of Fred K. Kirkland, T. pp. 228-29, E. p. 171-73, testimony of William L. Remsen). In addition, this witness, in the Court's view, was the key witness necessary to play a predicate for introduction of the Jimmie Diesel bill indicating that petitioners had incurred costs in consequence of respondent's improper performance of its work. This bill, further, was a key element on the reasonableness of charges issue (T. p. 375) since it discloses that Jimmie's Diesel charged less than half as much for a complete engine overhaul as respondent did for the partial engine overhaul which it contends constituted the limits of its engagement (T. pp. 320-31). Indeed, the relevance of the testimony of the Jimmie's Diesel witness was acknowledged by both the respondent's counsel and the Court:

> (Mr. Ralph) I submit that the only evidence in this record concerning those engines was the testimony of Mr. Remsen and the captain, both of whom stated that the loss of this quantity of oil out of these engines was because of this preexisting condition that had been recommended for a general overhaul. Both of

them testified that this oil could not have leaked out of this drip.

The Captain testified that when he went down to the engine room, it was not that quantity of oil from the drip. Mr. Remsen testified that that was one drip every three minutes and that both before and continuously, and including afterwards, this vessel was throwing fuel oil out of the exhaust, and there is not one iota of evidence from which it can be inferred that what happened on the trip to Nassau occurred as a result of anything that Merrill-Stevens was ordered to do, not one iota.

(The Court) I think that is correct. There has been testimony here by Mr. Remsen who said that he was advised that Jimmie Diesel accomplished a major overhaul. He didn't know of any of the circumstances of it or what it was supposed to do (T. p. 320).

It is clear that failure to grant a continuance supplies grounds for grant of a motion for new trial under circumstances such as the present. See 6 *Moore's Federal Practice*, Section 59.15[3]. It is also clear that the refusal to grant a new trial under appropriate circumstances may itself be an abuse of discretion, see *Georgia Pacific Corporation v. United States*, 264 F. 2d 101 (5th Cir. 1959); *Commercial Credit Corp. v. Pepper*, 187 F. 2d 71 (5th Cir. 1951). In the present case, allowing an additional day or two for the owner of defendant to personally appear and to produce the evidence of its key witness would scarcely have prejudiced the plaintiff, and, under these circumstances, the error of the trial court is patent, see *Gallis v. Peellee Company*, 264 F. 2d 663 (2nd Cir. 1959). As noted, defendant did not seek a repetition of the testimony already taken, merely the opportunity to adduce the missing testimony of two vital witnesses in a Court trial (see Appendix E).

It is appropriate for this Court in this case to afford guidance to the lower federal courts on the principles governing continuances and new trial motions in federal civil litigation, an area which should not be permitted to become a stepchild of the law. See generally *Cornwell v. Cornwell*, 118 F. 2d 396 (D.C. Cir. 1941); *Commercial Credit Corp. v. Pepper;* 187 F. 2d 71 (5th Cir. 1951); *Talon, Inc. v. Union Slide Fastener Co. Inc.*, 266 F. 2d 731 (9th Cir. 1959). At the least, the questions presented require plenary attention by the Court of Appeals. Grave though the pressures may be of cases and questions of public law, the point has not been reached where the principles of any judicial system demand that private parties sacrifice judgments of nearly $20,000 on the altar of overly "efficient" judicial administration in trial and appellate courts.

CONCLUSION

For all these reasons, the judgment should be reversed and the case remanded to the Court of Appeals for the Fifth Circuit for a plenary hearing on the questions presented.

Respectfully submitted,

GEORGE W. LIEBMANN,

PETER H. GUNST,

Attorneys for Petitioners.

APPENDIX A

(E. 346) MEMORANDUM OF DECISION

(Style and Number Omitted) (Filed July 8, 1970)

This Admiralty and Maritime cause within the meaning of Rule 9 (h) was instituted in rem by the Plaintiff, Merrill-Stevens Drydock Co., against the Yacht or Motor Vessel "Cygnus" for the recovery of labor and material charges, together with collection costs, including reasonable attorneys fees, and interest.

Leon Shaffer Golnick claimed the vessel as owner, posting Stipulation for Costs having Fidelity & Deposit Company of Maryland as surety. The vessel was released on Stipulation to Abide Judgment having Great American Insurance Company of New York as surety.

Thereafter, Owner filed Answer, including a general denial, and Counterclaim. By way of defense and for counterclaim, he asserts some of the work was defectively and negligently performed to his resulting damage.

As ultimately set forth in Supplementary Answers to Plaintiff's Interrogatories, and as stipulated upon the trial Owner conceded that Plaintiff was entitled to payment as billed for Items 2, 3, 9, 20, 21, 22, 23, 25, and 28, contained in Plaintiff's First and Partial Billing through March 22, 1969, dated 25 March 1969, and its Second and Final Billing from 3/23/69 through 4/4/69, dated April 21, 1969, to Job Order No. 499, as well as telephone charges.

This left in issue Item 2 on Plaintiff's billing of 22 January 1969, in reference to an earlier Job Order No. 456; and in reference to the above referred to billings in respect to Job Order No. 499, dated 25 March and 21 April 1969: Items 1, 4, 5, 7, 8, 10, 11, 12, 13, 14, 15, 16, 17, 18, and 19. These items were contested on one or more grounds of lack of authorization, unreasonablness of the charges, or that the work was defectively or negligently performed. These assertions were both defensive and the predicate for the Counterclaim for damages.

AUTHORIZATION

The Captain signed work orders in reference to each of the items and authorized additional work and supplies found to be needed in the course of the performance of some of the items. There is no contention that the Plaintiff was ever advised that the Captain or person entrusted with the vessel had no authority to procure the repairs, supplies, or necessaries, involved in Plaintiff's billings, see 46 U.S.C.A. §973.

The evidence is that Gerald Ludwig was employed by the Owner as the Master, as well as the person whom the management of the vessel was entrusted within the contemplation of 46 U.S.C.A. §962, e.g. *Broward Marine v. Yacht "Mary Jane"* (5th Cir. 1963), 313 F. 2d 516, 1963 A.M.C. 868.

The existence of the Captain's authority does not rest alone upon the presumed, apparent authority of 46 U.S.C.A. §972. The Captain testified in detail in respect to the background, including his discussions with the Owner, giving rise to the items. He further testified that he spoke with the Owner and received his approval before authorizing the Plaintiff to proceed when the need for additional work and materials arose in reference to some of the items. The Court finds such to have been the case and that the subject matter of Plaintiff's billings was also with the express authority of the Owner, 46 U.S.C.A. §971.

Item 2, Job Order 456

This item for materials, with supports attached, was mailed to the Owner at his address in Baltimore, Maryland, in January 1969. No objection or exception was taken to the statement prior to the commencement of this action. The Court finds from all the evidence that the items were furnished and that the charge of $213.48 was reasonable.

Item 1, Job Order No. 499

This item involved the supplying and installation of an automatic bilge pump in the engine room at an agreed con-

tract price of $235.00. This price was quoted and agreed to in a telephone conversation between Plaintiff's Superintendant and Owner prior to his authorizing the Captain to sign the work order in lieu of Owner returning a work order from Baltimore to the Plaintiff in Miami, Florida. While this authorization is conceded in Owner's deposition obtained by Plaintiff in November, 1969, an issue of authority was asserted at the trial together with a contention that the pump did not work shortly after leaving the yard. The vessel proceeded from the yard to the Bahamas and after cruising there returned to Fort Lauderdale, Florida. There the Captain resigned. The Captain's testimony that the bilge pump was operative throughout the period he remained on the vessel and that of the Plaintiff's Superintendant that it was operative, is accepted by the Court. The Court finds a new pump in good working order was supplied and properly installed.

Item 4

This involves the making up of moulding for Bridge at a charge of $40.95 and is questioned as to the reasonableness of the charge. The charge is found to be reasonable.

Item 5

This item, described as check starboard main engine throttle control, involved considerable removal and replacement of panelling and the tracing of cables and connections which had been hanging up. Contrary to owner's contention, the Court finds the charges of $105.00 to be reasonable.

Item 7

The charge of $351.90 is found to be reasonable and the materials are found to have been furnished.

Item 8

The charge of $45.00 for removing the anchor to a float, its straightening ashore, and reinstallation, is found to be reasonable.

Item 10

This item in the amount of $367.20, involves the supplying and installing of a T.V. Antenna, staff, brackets, lines, and outlets to the bridge, galley, and aft deck, is found to be a reasonable charge. The Court finds, contrary to the deposition testimony of the Owner, that the antenna was not defective, was properly installed, and that it was operative from the time of installation to include the period the Captain remained on board the vessel and that any difficulty in receiving signals was due to the vessel being out of receiving range. The Court further finds that any difficulty subsequently encountered has not been established to be due to any defect in quality or installation or from causes for which the Plaintiff is responsible.

Item 11

This involved the fabrication of 6 new porthole screens including their metal frames and the rebuilding of numerous existing screens in the amount of $368.71. Plaintiff concedes that one of the workmen mistakenly assumed all of the portholes were the same size and they had to be reworked. The rework time was deducted from the total time spent and the amount billed did not include the time spent in making the corrections. This type screen is usually produced by concerns specializing in their manufacture. While the cost from such a manufacturer would admittedly be less than having them fabricated in a yacht yard, the Owner was pressed for time to have the vessel available in Nassau and could not await the delay involved in obtaining their fabrication from a conventional source. The Court finds that the charge of the Plaintiff was reasonable if secured from a yacht yard at the order and election of the Owner as here.

Item 12

This item in the amount of $216.93 involved the removal of two existing steel oil lines forward of each main engine, the fabrication or shaping of replacements and one additional spare. The Court finds the charge to be reason-

able and the work properly performed. The Court concludes that whatever difficulty Owner encountered with oil lines it involved neither these lines nor did it arise from a cause attributable to materials or work of Plaintiff.

Item 13

This item in the amount of $2,878.36 ultimately involved the checking and repairing or replacement of injectors on the port and starboard engines, removal of the cylinder heads, checking for cracks and distortion, the grinding of valves, and compression tests.

In addition the port and starboard engine blowers were overhauled. Both port and starboard main engine heat exchangers were to be removed, cleaned, hydro tested, and repaired as necessary. The heat exchangers on Hydro test were found to be too far gone to be repaired and new heat exchangers were supplied and installed. Owner asserts this work was not properly performed and the charges to be unreasonable.

The engines had previously been throwing oil out of the stack and through the exhaust leaving an oil slick. Plaintiff on the basis of a preliminary inspection, compression tests, and in the presence of these circumstances, expressed to the Owner the opinion that the engines needed major overhaul and recommended that this be accomplished. Mr. Golnick advised that his need for use of the yessel did not permit time for a major overhaul and limited the scope of the item in this regard.

After leaving the yard, the Captain in attempting to proceed to Nassau, Bahamas, returned to Miami on two occasions due to inclement weather. In the course of a subsequent endeavor, the starboard engine suddenly lost compression, overheated and seized. The engine was immediately shut down. It was found to have lost its oil. The vessel returned to Miami on one engine and eventually returned to Plaintiff's yard. An operating inspection disclosed excessive discharge of oil through the stack and through the exhaust. A minor oil leak was found at a connection in

an oil line aft of the engine. This leak amounted to approximately one drop every four minutes.

Owner asserted to the plaintiff his belief that the difficulty with the engine was the result of defective work by the Plaintiff. The parties agreed to have the engine inspected by Detroit Diesel, local representative of the engine manufacturer, at which time the Owner stated he desired to be present. Arrangements were made for Detroit Diesel to conduct such an inspection at a time mutually agreed by the parties. The Owner subsequently advised the Plaintiff that he would not be present and that he was having the engine overhauled by Jimmy's Diesel. Plaintiff then advised Owner that it would, in no event be responsible if the engines were worked on by a third party without the joint survey and inspection of the engine as previously agreed to. A major overhaul of the engine was accomplished by Jimmy's Diesel. Owner had experienced difficulties with these engines for a considerable period of time prior to the work performed by the Plaintiff. Subsequent to the overhaul by Jimmy's Diesel and additional work by others thereafter, Owner continued to have difficulties with the engines. Owner-Counterclaimant produced no witnesses personally involved in reference to this item or other items he contests.

The Court finds that the Plaintiff performed the work to the extent authorized in a proper manner and that the Owner's difficulties with the engines were due to their generally poor condition. The minor oil leak aft of the engine did not contribute to the overheating and seizure of the engine or the major loss of oil experienced. The Court further finds that the need for the subsequent work on the engines arose from conditions for which the plaintiff is not responsible.

The Owner did not appear at the trial, the date for which was set in January of this year. The Owner's deposition, taken by Plaintiff, was received into evidence, subject to the Plaintiff's objections as to hearsay and competency of owner in terms of opportunity to observe or to express

technical opinion. The Court has considered the deposition of the Owner and has disregarded portions thereof in terms of these objections and has considered the remainder, according those matters the varying weight to which entitled.

The Owner further asserts that the charges for this item were unreasonable. In support of his contentions in reference to this and other items, Owner presented the testimony of Mr. Hallcauer, whose professional competency was the subject of agreement. The Court, during the course of his testimony sustained in several instances objections of the Plaintiff to questions propounded to Mr. Hallbauer on the basis he had little or no familiarity with the vessel in question, and that many of the items as respects reasonableness would admittedly vary from vessel to vessel, depending upon the nature of the particular installation, including the removal and renewals, and other factors which would be encountered. In addition, Mr. Hallbauer's testimony was elicited on the basis of his interpretation of what was involved from the printed item description and in some instances, as in the case of Item 13, was limited to the reasonable charges in respect to only a portion of the authorized work performed in reference to that item. These factors have also been taken into account by the Court in (R-535) determining the weight, if any, to be given his testimony which was admitted. After so considering Mr. Hallbauer's testimony, together with all of the other evidence bearing upon this item, the Court finds that the Plaintiff's charges were reasonable.

Item 14

The Court finds from all of the evidence that the Plaintiff's charges in the amount of $817.78 for the removal of deteriorating pipe and valves leading to the generator heat exchanger is reasonable.

Item 15

Owner asserts that this $5,250.00 contract item, which involved the supplying and installation of a new 15 K.W.

Diesel Generator with sound shield and battery, including connecting of fuel supply, cooling system, exhaust system, and electrical hook-up to existing system making changes as found necessary to make operate satisfactorily, was not properly performed. The evidence shows that Owner's contention is predicated upon the asserted failure of some air-conditioning motors and other difficulties at a subsequent date. The evidence establishes that after installation of this generator it was run for several hours with all electrical systems, both A.C. and D.C., in operation and were found to operate satisfactorily. No difficulty was encountered thereafter to include the date the Captain of the vessel resigned in Fort Lauderdale, *following the vessel's usage* in the Bahamas. The Court finds that this item was properly performed by the plaintiff. No connection has been shown to exist between the difficulties alleged by the Owner and the performance of this item.

Item 16

The Court finds, contrary to the assertion of the Owner, that Plaintiff's charges in the amount of $438.05 in reference to this item is reasonable. It involved making up and installing chafting strips for stem and stern, and devils claw for the anchor chain.

Item 17

This item involved the renewing of the anchor windlass switch and protective covering therefor, and the checking of the windlass motor and its condition, for which the Plaintiff's charges are in the amount of $58.82. The Court finds that these charges are reasonable and that the work was performed by the Plaintiff in a proper manner.

Item 18

This item involved the relocation of shoreline fittings, including the leads. They were originally installed on the bulkheads of the house and were relocated to the upper area of the hull. A new shoreline was furnished and a power

panel supplied to supply A.C. and the ship's power. The Plaintiff's charge in the amount of $1,066.99 is found by the Court to be reasonable. The Owner also asserts that this work was defectively performed. The Court finds that the work was properly performed. The installations were tested and operated satisfactorily during the period the Captain remained on the vessel. The outlets were equipped with screwcaps and rubber gaskets to prevent the entry of water. The evidence indicates to the Court that any difficulty subsequently encountered resulted from a failure to adequately replace or tighten the protective caps which permitted the entry of water with resulting corrosion and deterioration.

Item 19

This item involves the testing of a spare fuel tank under Owner's berth and to pipe up to main fuel tanks if found in good condition, including the supplying and installation of a fuel transfer pump to transfer fuel into main tanks. The Court finds that Plaintiff's charge in the amount of $761.62 is reasonable. The Owner asserts this work was performed defectively and that oil bounces out of the tank and also flows back from the main fuel tank. The Plaintiff pressure tested the tank. In connection with inspecting the tank, Plaintiff desired to cut out a portion which the Captain would not authorize as he preferred the tank to remain undisturbed. No difficulty was encountered with the installation during the period of time the Captain remained aboard the vessel and the Plaintiff performed the work requested of it. The Court finds that the plaintiff properly performed the work.

Plaintiff's billing dated 25 March 1969, was forwarded to the Captain who delivered it to the Owner in Nassau following the vessel's departure from the yard. The billing dated 21 April 1969, was mailed to Owner's Baltimore address. All were due and payable.

Attorney's Fees

Plaintiff's signed work orders at the time the present items were authorized provide in part: "Should it become

necessary to collect any portion of the above sums upon the demand of an attorney, the undersigned agrees that the above named vessel and its owner shall pay a reasonable attorney's fee, costs and interest at 6% per annum whether suit be brought or not."

Plaintiff presented expert testimony concerning a reasonable attorney's fee. This testimony was after the witness had examined the file of Plaintiff's attorneys, including its attorneys' time sheets for services performed prior to the beginning of the trial. This testimony further contemplated a reasonable fee for each normal day of trial and the normal time expended in the preparation of proposed form of Findings of Fact and Conclusions of Law, and Judgment. The Owner has presented no evidence on the question of reasonableness of the amount of time expended or the reasonableness of a fee for such services. The Court finds that the Plaintiff is entitled to recover reasonable attorneys fees in the amount of $2,825.00.

' Owner has questioned whether the reasonable attorneys fees recoverable constitute a portion of the maritime lien against the vessel. The Court is of the opinion that Plaintiff's recovery for attorneys fees constitutes a portion of its maritime lien against the vessel.

Costs of collection, including reasonable attorneys fees, have been held recoverable in rem in the foreclosure of a mortgage when contracted for by the parties. *The Home* (D.C. W.D. Wash. N.D. 1946), 65 F. Supp. 94; *The John Jay* (D.C. E.D. Pa. 1936), 15 F. Supp. 937.

No reason appears why the same rule should not apply in the case of like contractual provisions contained in a maritime repair contract as here. As the circumstances of the instant case demonstrate, such an undertaking is a reasonable portion of the consideration to the yard for the work and materials contracted for. The case of *Allen* v. *The Contessa* (D.C. S.D. Tex. 1961), 196 F. Supp. 649; 1961 A.M.C. 2190, cited by Owner, merely holds that a state statute relied upon in that case in the absence of a con-

tract did not contemplate attorneys fees in rem against vessels.

In addition, the Court has in personal jurisdiction over the Owner by virtue of the Counterclaim filed in this case, *The Cooperfield and the Dea* (5th Cir. 1928), 26 F. 2d 175; 1928 A.M.C. 1017; Cf. *Acme Boat Rentals, Inc.* v. *J. Ray McDermott* (5th Cir. 1970), 424 F. 2d 393; if not also by virtue of the unqualified form of Claim of Owner filed in this cause, Supp. Rules C (6) and E (8).

Conclusion

No portion of Plaintiff's charges have been paid.

The Plaintiff is entitled to recover from the defendant vessel and stipulators, and from the Owner-Counter-claimant, Leon Shaffer Golnick, its charges in the principal amount of $14,180.50 with interest at the rate of six percent (6%) per annum on $213.48 thereof from 1 February 1969; on $13,177.56 thereof from 1 April 1969; and on $789.46 thereof from 1 May 1969, together with its costs to be hereinafter taxed by the Clerk.

Plaintiff is also entitled to recover from the defendant vessel and its stipulators and from the Owner-Counterclaimant, Leon Shaffer Golnick, reasonable attorney's fees in the amount of $2,825.00.

The Owner-Counterclaimant is not entitled to recover on his Counterclaim.

This Memorandum of Decision constitutes the Court's Findings of Fact and Conclusions of Law pursuant to Rule 52. Final Judgment is being entered in conformity herewith.

Dated at Miami, Florida, the 7th day of July, 1970.

/s/ Ted Cabot,

United States District Judge.

FINAL JUDGMENT

(Style and Number Omitted) (Filed July 8, 1970)

This Cause having come on for trial before the Court without a jury and a decision constituting the Court's Findings of Fact and Conclusions of Law having been duly rendered, it is hereby ORDERED and ADJUDGED:

1. That the plaintiff, Merrill-Stevens Dry Dock Co., a Florida corporation, recover of and from the defendant vessel and its stipulator, Great American Insurance Company of New York; and of Leon Shaffer Golnick, jointly and severally, the sum of $14,180.00 with interest at 6% per annum on $213.48 thereof from 1 February 1969, in the amount of $17.33; on $13,177.56 thereof from 1 April 1969, in the amount of $937.57; and on $789.46 thereof from 1 May 1959, in the amount of $52.22; together with reasonable attorneys fees in the amount of $2,825.00; or in the total amount of $18,012.12.

2. That the plaintiff, Merrill-Stevens Dry Dock Co., a Florida corporation, further recover of and from the defendant vessel and its stipulator, Fidelity & Deposit Company of Maryland; and of Leon Shaffer Golnick, jointly and severally, its costs to be hereinafter taxed by the Clerk.

3. That the Claimant-Counterclaimant take nothing and that the Counterclaim is dismissed on the merits.

4. Plaintiff to have execution of Notice of Appeal not be filed within 10 days from the date of entry hereof.

Dated at Miami, Florida, the 7th day of July, 1970.

/s/ TED CABOT,

United States District Judge.

APPENDIX B

In The
United States Court of Appeals
For The Fifth Circuit

No 31087
Summary Calendar*

Merrill-Stevens Dry Dock Co.,
Plaintiff-Appellee,

versus

The M/V "CYGNUS" Of American Ownership, her engines, tackle, apparel, and other appurtenances thereto appertaining,
Defendant-Appellant,

and

Leon Shaffer Golnick,
Appellant.

Appeal from the United States District Court for the Southern District of Florida

---

(April 13, 1971)

Before Thornberry, Morgan and Clark, Circuit Judges.

PER CURIAM: AFFIRMED. See Local Rule 21.[1]

JUDGMENT

This cause came on to be heard on the transcript of the record from the United States District Court for the

---

*Rule 18, 5 Cir.: see Isbell Enterprises, Inc. v. Citizens Casualty Company of New York, et al., 5 Cir. 1970, 431 F.2d 409, Part I.

[1]See *NLRB* v. *Amalgamated Clothing Workers of America*, 5 Cir., 1970, 430 F. 2d 966.

Southern District of Florida, and was taken under submission by the Court upon the record and briefs on file, pursuant to rule 18;

ON CONSIDERATION WHEREOF, It is now here ordered and adjudged by this Court that the judgment of the said District Court in this cause be, and the same is hereby, affirmed.

It is further ordered that defendant-appellant and appellant pay to plaintiff-appellee, the costs on appeal to be taxed by the clerk of this Court.

April 13, 1971

Issued as Mandate.

APPENDIX C

(May 27, 1971)

ON PETITION FOR REHEARING

Before Thornberry, Morgan and Clark, Circuit Judges.

PER CURIAM:

IT IS ORDERED that the petition for rehearing filed in the above entitled and numbered cause be and the same is hereby DENIED.

APPENDIX D

FIFTH CIRCUIT RULE 18. SUMMARY CALENDAR

(a) Whenever the court, sua sponte or on suggestion of a party, concludes that a case is of such character as not to justify oral argument, the case may be placed on the summary calendar.

(b) A separate summary calendar will be maintained for those cases to be considered without oral argument. Cases will be placed on the summary calendar by the clerk, pursuant to directions from the court.

(c) Notice in writing shall be given to the parties or their counsel of the transfer of the case to the summary calendar.

Added December 24, 1968.

FIFTH CIRCUIT RULE 21. AFFIRMANCE WITHOUT OPINION

When the court determines that any one or more of the following circumstances exists and is dispositive of a matter submitted to the court for decision: (1) that a judgment of the district court is based on findings of fact which are not clearly erroneous; (2) that the evidence in support of a jury verdict is not insufficient; (3) that the order of an administrative agency is supported by substantial evidence on the record as a whole; (4) that no error of law appears; and the court also determines that an opinion would have no precedential value, the judgment or order may be affirmed or enforced without opinion.

In such case, the court may in its discretion enter either of the following orders: "AFFIRMED. See Local Rule 21," or "ENFORCED. See Local Rule 21."

Added July 1, 1970.

28 U.S.C. § 1291. FINAL DECISIONS OF DISTRICT COURTS

The courts of appeals shall have jurisdiction of appeals from all decisions of the district courts of the United States, the United States District Court for the District of the Canal Zone, the District Columbia, Guam, and the District Court of the Virgin Islands, except where direct review may be had in the Supreme Court.

46 U.S.C. § 971. PERSONS ENTITLED TO LIEN

Any person furnishing repairs, supplies, towage, use of dry dock or marine railway, or other necessaries, to any vessel, whether foreign or domestic, upon the order of the owner of such vessel, or of a person authorized by the owner, shall have a maritime lien on the vessel, which may be enforced by suit in rem, and it shall not be necessary to allege or prove that credit was given to the vessel.

APPENDIX E

MOTION FOR NEW TRIAL

(Style and number Omitted) (Filed July 17, 1970)

Defendant, Leon Shaffer Golnick, and the Claimant-Owner by their undersigned counsel severally move pursuant to Rule 59 of the Federal Rules of Civil Procedure that the Court order a new trial herein and state as ground therefor the following:

1. Defendant and Claimant-Owner were each effectively denied a full and fair trial by the denial of the motion for continuance filed June 22, 1970 and the ore tenus motion for continuance made in open court based upon the sudden and unexpected illness of the Defendant and Claimant-Owner as evidenced in Court by telegrams of his physician, Israel Zinberg, M.D. and of Leon Shaffer Golnick, copies of which are attached hereto and marked Exhibits A. and B., respectively, and as further set forth in Leon Shaffer Golnick's affidavit attached hereto, marked Exhibit C, to which is attached the affidavit of said Dr. Zinberg.

The granting of the continuance would have made it possible to present essential testimony of said Golnick and of the witness Bob Sacks whose attendance Defendant was unsuccessful in securing as evidenced by counsel's affidavit attached hereto, marked Exhibit D.

2. The Court erred in excluding testimony essential to the Defendant's cause during the trial. Certain opinion evidence of the expert Hallbauer was excluded which should have been admitted. The answers and supplemental answers to interrogatories were excluded though admissible under the rules.

3. The Court improperly placed the burden of proving the unreasonableness of charges on the defense.

4. The Court failed to give effect to the evidence and testimony presented by the defense reflecting the unreasonableness of charges and plaintiff's violation of the warranty of workmanlike service.

5. The Court improperly allowed attorney's fees to plaintiff.

6. The Court improperly entered judgment against Leon Shaffer Golnick.

Dated this 18th day of July 1970.

SHUTTS & BOWEN,

By: /s/

Attorneys for Defendant and Claimant-Owner.

(Certificate of Service omitted.)

EXHIBIT A

(R. 548)

WESTERN UNION TELEGRAM

939P EDT JUN 30 70 AA891 PC260
P BRB350 PA 3 EXTRA BALTIMORE MD 30 706P EDT
C LARRIMORE, DLY 75 (IF NO ANSWER PUT UNDER DOOR)
SHUTTS AND BOWEN ATTORNEY 1000 FIRST NATIONAL BANK BLDG. MIAMI FLO

MY PATIENT LEON GOLNICK BECAME ILL THIS EVENING MR. GOLNICK EXPERIENCED A MYOCARDIAL INFARCTION SEVERAL YEARS AGO AND AGAIN SEVERAL MONTHS AGO. IN VIEW OF THE SYMPTOM WHICH HE EXPERIENCED TODAY COUPLED WITH STRENUOUS ACTIVITY OF THE LAST WEEK AND THIS WEEK I ORDERED HIM TO BED AND NOT TO PROCEED TO FLORIDA AS HE INTENDED. I HAVE BEEN ASKED TO ADVISE YOU OF THIS

DR I S ZINBERG 400 NORTHERN PARKWAY
(913)

EXHIBIT B

WESTERN UNION TELEGRAM

1104 P EDT JUN 30 70 AB874 PA521
P BRB423 PA PDB BALTIMORE MD 30 1000P EDT

HONORABLE US DISTRICT COURT, DLY 75, DLR TONIGHT, LEAVE WITH NIGHT WATCHMAN FOR DLY TO OFFICE OR TRY DLR *BEFORE 8AM TOMORROW* CARE C LARRIMORE ATTY SHUTTS AND BOWEN 100 FIRST NATIONAL BANK BLDG MIAMI FLO

I SINCERELY REGRET THAT I AM PHYSICALLY UNABLE TO TESTIFY TOMORROW IN MY BEHALF.

IN AN EFFORT TO MEET THE COURT'S REQUIREMENT I INTERRUPTED AND LEFT A VITAL MEETING IN NEW YORK TODAY WITH A MAJOR NEW CLIENT (RCA RADIO CORP. OF AMERICA). WHEN I WAS ADVISED THAT IT WOULD BE NECESSARY FOR ME TO APPEAR TOMORROW. I ARRIVED IN BALTIMORE 3PM AND MADE ARRANGEMENTS ON NORTHEAST AIRLINES FLIGHT 105 LEAVING FT LAUDERDALE 725 PM THIS EVENING WHICH WAS THE ONLY DIRECT FLIGHT INTO THE MIAMI VICINITY. IN ADDITION RESERVATIONS WERE MADE FOR ME AT THE HOTEL COLUMBUS IN MIAMI FOR THIS EVENING. IN THE COURSE OF PACKING PERSONAL BELONGINGS FOR THE TRIP I BECAME NAUSEOUS AND FAINT. BECAUSE OF A RECENT EPISODE DURING WHICH I HAD EXPERIENCED THE SAME SYMPTOMS AND HAD BEEN CONFINED TO BED, MY PHYSICIAN WAS CALLED. I WAS ADVISED BY HIM THAT UNDER NO CIRCUMSTANCE WAS I TO CONTINUE ON TO FLORIDA; AND THAT IF I DID SO, I WOULD BE PLACING MY HEALTH IN JEOPARDY. I BELIEVE THE COURT IS AWARE THAT I HAVE PRESIDED OVER A NATIONAL SALES MEETING FROM LAST THURSDAY THROUGH MONDAY OF THIS WEEK I HAD HAD LITTLE OR NO REST. AT 6 AM THIS MORNING I LEFT FOR NEW YORK — AND AS I HAVE INDICATED, RETURNED TO BALTIMORE

FULLY INTENDING TO FLY TO FLORIDA TONIGHT. I CAN ASSURE YOUR HONOR, THAT I AM MOST ANXIOUS TO TELL THE COURT MY VERSION OF WHAT TRANSPIRED AFTER MY BOAT WAS LEFT TO BE REPAIRED BY THE MERRILL STEVENS YARD. I AM ACQUAINTED WITH THE TESTIMONY GIVEN BY WITNESSES FOR MERRILL STEVENS AND I REQUEST THAT I BE GIVEN AN OPPORTUNITY TO DESCRIBE MY EXPERIENCES WITH THE WORK THAT WAS PERFORMED BY THAT YARD — SO THAT THE COURT MAY HAVE ALL THE FACTS BEFORE A DECISION IS MADE. RESPECTFULLY LEON SHAFFER GOLNICK.

3 PM 105 725 PM. (1050)

(R. 550)

EXHIBIT C

AFFIDAVIT

To Whom It May Concern:

I, Leon S. Golnick do hereby certify:

1. That I am submitting this Affidavit for the purpose of verifying under oath that due to my sudden and unexpected illness, I was unable to appear on or about June 29, 1970, and thereafter up to and including Wednesday, July 9, 1970, for the purpose of offering testimony at the trial scheduled on June 29, 1970. My inability to appear was based upon the orders of my personal physician, Israel Zinberg, M.D.

2. I have attached hereto the Affidavit of my personal physician, Israel Zinberg, M.D., in order to verify the above statement and in addition, to verify the facts and matters set forth in his telegram which was offered to this Court in evidence.

3. This Affidavit will further serve to verify the contents of my telegram to counsel concerning my illness, which telegram also was entered into evidence in this matter.

4. Had I been available to testify at trial, my testimony, in addition to supporting all of the facts and matters set forth in my deposition taken on November 7, 1969, would have included relevant and important information regarding the following items:

a. My conversations with Captain Ludwig concerning (1) his authority to authorize additional work (2) the quality of the work performed and (3) the damages caused by the faulty performance of work.

b. My conversation with the subpoenaed witness, Bob Sacks, who failed to appear at trial, concerning the fitness of the work done by Merrill-Stevens on the engines.

/s/ LEON S. GOLNICK

(Jurat omitted.)

(R. 552)

AFFIDAVIT

To Whom It May Concern:

1. I am Leon S. Golnick's personal physician and submit this Affidavit for the purpose of further explaining Mr. Golnick's physical condition which prevented him from traveling to Miami to testify.

2. As I indicated in my telegram to counsel, I instructed Mr. Golnick not to travel to Miami because of various symptoms which were described to me, as fully indicated in that telegram. I examined Mr. Golnick on the following day and found that he was suffering from a severe viral infection. At the time of the examination Mr. Golnick's temperature was 101 degrees F. I prescribed medication and instructed Mr. Golnick to remain in bed. It was not until Thursday, July 9, 1970 that he was able to leave his bed and return to work.

/s/ ISRAEL ZINBERG, M.D.

Dated: July 14, 1970

(Jurat omitted.)

(E. 371; R. 553)

AFFIDAVIT OF COUNSEL

(Style and Number omitted.)

State of Florida, ss:
County of Dade,

Before me, the undersigned authority personally appeared, Chris C. Larrimore, who after being first duly sworn deposes and states:

1. Affiant is attorney for Defendant herein and has personal knowledge of the facts stated herein.

2. Affiant caused to be issued and delivered to the Marshal on Tuesday, June 23, 1970 a Subpoena Duces Tecum to Bob Sacks of Jimmie Diesel Service, 961 N.W. 7th Street, Miami, Florida.

3. The U.S. Marshal's office advised affiant that Deputy Marshal, Bill Hunter, was unable to serve the Subpoena upon said Bob Sacks, that the witness was contacted by the Deputy on June 25 and told by the witness that he would call the Deputy and pick up the Subpoena before the trial. The witness did neither and the Subpoena was returned unexecuted.

Further Affiant sayeth not.

/s/ CHRIS C. LARIMORE.

(Jurat omitted.)